



SHORELAND ZONING NEWS

Volume 16, Issue 1

Spring 2003

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Please Share

For over ten years, the Shoreland Zoning News has been helping town officials better understand the common issues surrounding shoreland zoning administration and enforcement. At least that is the feedback we've been getting. Unfortunately, we also hear that the News is not getting to everyone who would like to see it.

We keep our costs and mailing list manageable by sending four copies to one locally designated contact person to distribute to the selectmen, planning board, appeals board and code officer. If you are the contact person, please make sure the newsletters reach the other town officials.

Retaining Walls Within the Setback Area -Allowed or Not?

The Mandatory Shoreland Zoning Act defines a structure as "anything built for the support, shelter or enclosure of persons, animals, goods or property of any kind, together with anything constructed or erected with a fixed location on or in the ground, exclusive of fences". This definition is very inclusive. Strictly interpreted, picnic tables, flag poles, and park benches are structures that must meet setback requirements. The Shoreland Zoning Unit, however, has taken the position that some "structures", such as those noted above, are so minor that strict adherence to the structure definition would create problems, political and otherwise.

Retaining walls are constructed with a fixed location on the ground. Thus, they are structures. The Shoreland Zoning Unit, prior to September of 2002, has taken the position

that all retaining walls, regardless of size or height, are structures that must meet the water setback requirements, unless clearly necessary for erosion control. The Unit, however, recognizes that the construction of low walls on grassed areas does little to harm the natural beauty of the shoreland zone, and may even be helpful in preserving water quality by providing flat terraces, rather than a sloping lawn to the waterbody. Therefore, the Department of Environmental Protection will allow a municipality to permit low retaining walls, and associated fill behind them within the water setback area, provided:

- 1) the wall(s) is (are) at least 25 feet, horizontal distance, from the normal high-water line of a waterbody or upland edge of a wetland;
- 2) The site of the retaining wall is legally existing...

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...*Retaining Walls, continued from page 1.*

- lawn or is a site eroding from lack of naturally occurring vegetation, and that the situation is not the result of a violation of the shoreland zoning ordinance;
- 3) The combined total height of the wall(s) shall be no more than 24 inches;
 - 4) The area behind the wall is revegetated with grass, shrubs, trees, or a combination thereof, and no further structural development shall occur within the setback area, including patios and decks; and
 - 5) If within 75 feet of a waterbody, a permit by rule is obtained from the Department.

This policy is intended to address only altered sites where an effective vegetative buffer does not exist.

Your municipality is not required to adhere to this policy. You can continue to prohibit all new retaining walls within the setback area, regardless of size, except those necessary for erosion control.

Reminder: Now that town meeting time is upon us, please remember that ordinance amendments have to be submitted to the Commissioner of the Department of Environmental Protection for approval before the amendment is effective. Amendments, certified by the town clerk, should be sent to the DEP at State House Station #17, Augusta, ME 04333-0017.

*The Department will continue to review and comment on draft ordinance changes before a town meeting if requested.

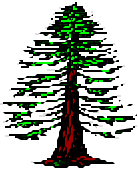
Decks and Porches

Department Shoreland Zoning staff frequently receive calls from municipal officials inquiring whether someone can enclose a legally existing deck without counting the new space toward the 30% volume expansion limitation. The town can grant a permit for the construction of fixed walls to enclose a deck and that it would not add to *floor area*, but would count toward the 30% *volume* limitation. This position is further supported by the Superior Court decision, *Fielder v. Town of Raymond and John Cooper*, a decision you may want to familiarize yourself with. In the case of an individual seeking to create a screened porch with a roof over a legally existing deck, the Department's opinion is that neither volume or floor area are created. The floor area is already present and there are no fixed walls to create volume. We do not consider screens as fixed walls.

Staff Changes:

Since the last issue of *Shoreland Zoning News*, there have been several staffing changes in our regional offices. Val Whittier, the Assistant SLZ Coordinator in the Department's Bangor Office, has recently accepted another position in the Department's Division of Land Resource Regulation. Due to recent budgetary constraints her position has not yet been filled. In fact, it appears that the position will not be filled anytime soon. Alex Wong, Assistant SLZ Coordinator in the Portland Office, has left the Department to pursue career goals in the private consulting field. Alex's position has been filled recently and Mike Morse is now available to assist towns in the Southern Maine region. You may reach him at 822-6328.

Val and Alex will be missed in the SLZ Unit.



Forested Freshwater Wetlands



Forested wetlands have commonly been a confusing aspect to many in relation to municipal shoreland zoning ordinances.

Although many forested wetlands can be ecologically important, most municipal shoreland zoning ordinances do not regulate these wetlands except in certain locations. In fact, neither the Shoreland Zoning Law nor the State's *Guidelines for Municipal Shoreland Zoning Ordinances* (Guidelines) require a shoreland zone to be placed around forested wetlands. There is no requirement that a shoreland zone be placed around forested wetlands even if they are greater than 10 acres in size.

As such, many people have the impression that forested wetlands are not addressed under the State's Guidelines. This is not entirely correct. The Guidelines require areas of two or more contiguous acres supporting wetland vegetation and hydric soils, which are not part of a freshwater or coastal wetland as defined, and which are not superficially connected to a water body during normal spring high water to be zoned Resource Protection, unless already developed. These areas are usually forested wetlands.

Two or more acres of forested wetland need to be zoned, you say? Yes, however the key is that this only applies to a wetland within

the shoreland zone of another waterbody or non-forested wetland. The Guidelines require only the wetland itself be zoned Resource Protection, and not the area around it.

So, what exactly is a forested wetland? The Guidelines define a forested wetland simply as "a freshwater wetland dominated by woody vegetation that is six (6) meters tall or taller," which is about 20 feet.

Another confusing matter: When there is a great pond surrounded by scrub-shrub or emergent wetland and then followed by an area of forested wetland, where does the 250-foot shoreland zone begin for the great pond? In most instances, the easy answer is that as soon as the wetland becomes forested, the 250-foot shoreland zone begins. Some situations however make it more difficult to exactly determine "the line," such as when there is a gradual transition from a scrub-shrub wetland into forested wetland. You will need to determine where the wetland is "dominated" by trees 20 feet or taller.

A relatively simple judgment call is usually all that's necessary, although should a difficult site 'stump' you, don't hesitate to call us for our opinion.

Got a shoreland zoning question or issue you'd like to share with others? The Question and Answer section of the *Shoreland Zoning News* is a good forum for spreading the word. Just drop a note or a telephone message to the shoreland zoning staff at the DEP, and we'll try to include it in an upcoming newsletter.

Question & Answer:

Q. *A shorefront property owner wishes to rebuild an aging boathouse for his recreational watercraft. The building is located at the immediate shoreline. Can I, the CEO, grant a permit to the owner to rebuild on the same footprint?*

A. No. First of all, in 1998 the Maine Legislature declared that recreational boat storage buildings are not water-dependent. Therefore, the boathouse you refer to is a nonconforming structure. If a nonconforming structure is removed, damaged, or destroyed by more than 50% of its market value (a complete rebuild certainly meets this criteria), it can only be rebuilt after obtaining a permit from the planning board. The planning board must require the new structure to be placed at the location of the

lot that complies with the setback requirement to the greatest practical extent. This may result in the new structure being set back 100 feet from a lake or 75 feet from a tidal or riverine waterbody. If the full setback cannot be met, then the next most practical location must be determined. Only if there is no other location on the property where the structure can be rebuilt further from the water, can the planning board allow it to be built at the same setback as the previously existing structure.





Other DEP Changes...

Since the last issue of *Shoreland Zoning News*, there have been several changes to several Department regulations. These changes have affected the Department's authority as it pertains to the Natural Resources Protection Act (NRPA), and the Stormwater Management Act.

Last year NRPA was amended to extend its application to all regulated activities adjacent to protected natural resources, not just those activities that disturb soil, such as cutting and removing vegetation. Several exemptions were added, and previously existing exemptions such as those for forest management activities, maintenance and repair, etc. still exist in the NRPA.

In addition, Chapter 305, Permit by Rule Standards (PBR), was amended to allow adjacent activities to qualify for the PBR process *provided that* the applicant can demonstrate there is no other practicable alternative to locating the project within a 75 foot setback from the resource. Also, the setback from natural resources has been reduced from 100 feet to 75 feet. NOTE: The shoreland zoning structure setback and buffer requirement is still 100 feet adjacent to a great pond.

Chapter 310 has been renamed "Wetlands and Waterbodies Protection" and rivers, streams, and brooks have been added as natural resources subject to the rule. Chapter 310 addresses the licensing of projects that are not eligible for PBR.

The new authority under NRPA became effective September 1, 2002.

Effective March 10, 2003, a new program regulating stormwater runoff from construction activities took effect. Projects that disturb 1 or more acres at a time are now subject to the Maine Construction General Permit (MCGP). The MCGP requires, among other things, the use and maintenance of erosion controls and permanent stabilization of the site. A notification process, similar to the Permit by Rule program, has been created for this new program. For more information, contact your local DEP office.

Presque Isle- 1-888-769-1053
Bangor- 1-888-769-1137
Augusta- 1-800-452-1942
Portland- 1-888-769-1036

